

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GUY ADAM ROOK,

Petitioner,

v.

DONALD HOLBROOK,

Respondent.

CASE NO. C18-0233-JCC

ORDER

This matter comes before the Court on Petitioner's objections (Dkt. No. 52) to the report and recommendation of the Honorable Brian A. Tsuchida, United States Magistrate Judge (Dkt. No. 47). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby **OVERRULES** Petitioner's objections, **ADOPTS** the report and recommendation, and **DENIES** Petitioner's petition for a writ of habeas corpus for the reasons explained herein.

I. BACKGROUND

Judge Tsuchida's report and recommendation set forth the underlying facts of this case and the Court will not repeat them here. (*See id.* at 4–7.) The report and recommendation rejected Petitioner's argument that his life-without-parole ("LWOP") sentence for a third-strike driving offense with a *mens rea* of recklessness is grossly disproportionate in violation of the Eighth Amendment of the United States Constitution. (*Id.* at 14–32.) Petitioner's counsel has

1 filed objections to the report and recommendation, asking that the Court find that 28 U.S.C.
2 § 2254(d) does not apply to his Eighth Amendment claim and grant him habeas relief. (Dkt. No.
3 52 at 1.) The Court addresses each of Petitioner’s objections to the report and recommendation in
4 turn.

5 **II. DISCUSSION**

6 **A. Legal Standard**

7 A district court reviews *de novo* those portions of a report and recommendation to which
8 a party objects. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Objections are required to
9 enable the district court to “focus attention on those issues—factual and legal—that are at the
10 heart of the parties’ dispute.” *Thomas v. Arn*, 474 U.S. 140, 147 (1985). General objections, or
11 summaries of arguments previously presented, have the same effect as no objection at all, since
12 the court’s attention is not focused on any specific issues for review. *See United States v.*
13 *Midgette*, 478 F.3d 616, 622 (4th Cir. 2007).

14 **B. Adjudication of Eighth Amendment Claim on the Merits**

15 Petitioner asserts that the Washington State Court of Appeals did not adjudicate his
16 federal Eighth Amendment claim on the merits and therefore its decision is not entitled to
17 deference under 28 U.S.C. § 2254(d). (Dkt. No. 52 at 2–9.)

18 “An application for a writ of habeas corpus on behalf of a person in custody pursuant to
19 the judgment of a State court shall not be granted with respect to any claim that was adjudicated
20 on the merits in State court proceedings.” 28 U.S.C. § 2254(d). “A judgment is normally said to
21 have been rendered ‘on the merits’ only if it was ‘delivered after the court . . . heard and
22 *evaluated* the evidence and the parties’ substantive arguments.” *Johnson v. Williams*, 568 U.S.
23 289, 302 (2013) (quoting Black’s Law Dictionary 1199 (9th ed. 2009)). But when “a line of state
24 precedent is viewed as fully incorporating a related federal constitutional right . . . a state
25 appellate court may regard its discussion of the state precedent as sufficient to cover a claim
26 based on the related federal right.” *Id.* at 298–99 (collecting exemplary cases).

1 A brief examination of Washington’s repeat offender statute, the federal and Washington
2 constitutional provisions at issue, and relevant Washington caselaw is warranted. Under
3 Washington’s Persistent Offender Accountability Act (“POAA”), a “persistent offender” must
4 receive an LWOP sentence. Wash. Rev. Code § 9.94A.570. The POAA defines “persistent
5 offender” as a person who, having been convicted of two “most serious offenses” or their out-of-
6 state equivalents on two prior occasions, commits a third “most serious offense.” Wash. Rev.
7 Code § 9.94A.030(38). “Most serious offense” is in turn defined as any class A felony or
8 enumerated class B felonies that are violent, sexual, or dangerous. Wash. Rev. Code §
9 9.94A.030(33).¹

10 The Eighth Amendment of the United States Constitution bars “cruel and unusual
11 punishments.” U.S. Const. amend. VIII. Article I, section 14 of the Washington State
12 Constitution bars “cruel punishment.” Wash. Const. art. I, § 14. In analyzing challenges to
13 LWOP sentences imposed pursuant to the POAA, Washington courts have consistently “held
14 that [article I, section 14 of the Washington State Constitution] is more protective than the Eighth
15 Amendment.” *State v. Witherspoon*, 329 P.3d 888, 894 (Wash. 2014) (citing *State v. Rivers*, 921
16 P.2d 495, 502 (Wash. 1996)); *see State v. Moretti*, 446 P.3d 609, 613–14 (Wash. 2019)
17 (reviewing Washington caselaw and stating that “if it is not cruel under article I, section 14 . . .
18 then it is necessarily not cruel and unusual under the Eight Amendment”); *State v. Bassett*, 428
19 P.3d 343, 347–49 (Wash. 2018) (conducting *Gunwall* analysis and concluding that article I,
20 section 14 is more protective than the Eight Amendment in the context of juvenile sentencing);
21 *State v. Ramos*, 387 P.3d 650, 667 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017).
22 Washington courts have accordingly declined to analyze Eighth Amendment claims brought in
23

24 ¹ At trial, Petitioner was found guilty of vehicular assault under the reckless manner
25 alternative means, a qualifying offense under the POAA. *See State v. Rook*, 2013 WL 3227563,
26 slip op. at 3 (Wash. Ct. App. 2013); Wash. Rev. Code § 9.94A.030(33)(p). Petitioner’s two prior
qualifying convictions were for first degree robbery and first degree rape of a child, both of
which were committed when he was an adult. (*See* Dkt. No. 57 at 7, 19.)

1 parallel with article I, section 14 claims against an LWOP sentence imposed pursuant to the
2 POAA. *See, e.g., Moretti*, 446 P.3d at 613 (“Because we have previously held that article I,
3 section 14 offers more protection than the federal constitution in the context of sentencing both
4 recidivists and juveniles, we do not address the petitioners’ argument that [an LWOP sentence
5 imposed pursuant to the POAA] is cruel and unusual under the Eighth Amendment.”).

6 In ruling on Petitioner’s constitutional claims, the state court concluded that “[t]he state
7 constitutional prescription against ‘cruel punishment’ affords greater protection than its federal
8 counterpart. Thus, if the state constitutional provision was not violated, neither is the federal
9 provision.” *State v. Rook*, 2013 WL 3227563, slip op. at 6 (Wash. Ct. App. 2013) (footnotes
10 omitted) (citing *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980); *State v. Morin*, 995 P.2d 113,
11 115–16 (Wash. Ct. App. 2000)). Petitioner takes issue with the state court’s analysis on a number
12 of grounds, which the Court addresses in turn.

13 First, Petitioner argues that the state court could not have adjudicated the merits of his
14 Eighth Amendment claim because it did not cite federal caselaw or compare the federal and state
15 constitutional provisions and instead decided the issue “as a matter of binding state court
16 precedent.” (Dkt. No. 52 at 3–4.) But, as discussed above, Washington courts faced with paired
17 Eighth Amendment and article I, section 14 challenges to LWOP sentences imposed pursuant to
18 the POAA have consistently declined to analyze the Eighth Amendment claims. *See, e.g.,*
19 *Moretti*, 446 P.3d at 613–14. And in doing so, they generally do not extensively analyze the
20 differences in the constitutional provisions themselves or cite federal caselaw examining this
21 issue. *See id.*; *see also State v. Roberts*, 14 P.3d 713, 733 & n.11 (Wash. 2000) (“As we apply
22 established principles of state constitutional jurisprudence [regarding the protectiveness of article
23 I, section 14 and the Eighth Amendment] here, a *Gunwall* analysis is not required”); *but see*
24 *Bassett*, 428 P.3d 343, 347–49 (Wash. 2018) (conducting *Gunwall* analysis and concluding that
25 article I, section 14 is more protective than the Eight Amendment in the context of juvenile
26 sentencing). Therefore, while Petitioner takes issue with the perfunctory nature of the state

1 court's analysis, he has not established that the state court did not adjudicate the merits of his
2 Eighth Amendment claim on this ground.²

3 Petitioner next argues that the state court did not adjudicate the merits of his Eighth
4 Amendment claim because article I, section 14 is not inherently more protective than the Eighth
5 Amendment and because Washington courts have not been incorporating developments in
6 Eighth Amendment jurisprudence such that a ruling on an article I, section 14 claim necessarily
7 resolves an Eighth Amendment challenge. (Dkt. No. 52 at 5–7.) Neither argument has merit.
8 When faced with an adult offender's paired Eighth Amendment and article I, section 14
9 challenges to an LWOP sentence imposed pursuant to the POAA (as in Petitioner's case),
10 Washington courts have compared the language of the two constitutional provisions and have
11 consistently concluded that article I, section 14 grants more protection. *See, e.g., Witherspoon*,
12 329 P.3d at 894 (citing *Rivers*, 921 P.2d at 502) ("The Eighth Amendment bars cruel and unusual
13 punishment while article I, section 14 bars cruel punishment. This court has held that the
14 constitutional provision is more protective than the Eighth Amendment in this context.").

15 Petitioner cites Justice Sheryl Gordon McCloud's dissenting opinion in *State v.*
16 *Witherspoon*, 329 P.3d 888, 901 n.6 (Wash. 2014), for the proposition that Washington courts
17 have refused "as a matter of precedent, to consider LWOP sentences to be any more severe than
18 life-with-parole sentences" in spite of the Supreme Court's decision in *Graham v. Florida*, 560
19 U.S. 48 (2010). (Dkt. No. 52 at 6–7) (citing *Rivers*, 921 P.2d at 503; *Witherspoon*, 329 P.3d at
20 895)). But the *Witherspoon* majority analyzed both *Graham* and the Supreme Court's subsequent
21 decision in *Miller v. Alabama*, 123 S. Ct. 2455 (2012), and rejected the petitioner's contention
22

23 ² Petitioner further challenges the state court's cited authority as either old or similarly
24 lacking in necessary analysis. (Dkt. No. 52 at 4) (citing *Fain*, 617 P.2d at 723; *Morin*, 995 P.2d
25 at 116). His challenge is unavailing. Neither decision has been overruled, and in fact both have
26 been cited as authority in recent Washington decisions. *See, e.g., Moretti*, 446 P.3d at 613 ("We
also hold that the sentences in these cases are not grossly disproportionate to the offenses under
the four *Fain* factors"); *State v. Moen*, 422 P.3d 930, 936 (Wash. Ct. App. 2018) (quoting *Morin*,
995 P.2d at 116)).

1 that those decisions dictated that LWOP sentences imposed on adult offenders pursuant to the
2 POAA violated the Eighth Amendment. *See Witherspoon*, 329 P.3d at 895–96; *see also Miller v.*
3 *Alabama*, 123 S. Ct. 2455, 2458 (2012) (noting that *Graham* “concluded that the [Eighth]
4 Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted
5 of a nonhomicide offense”). Thus, contrary to Petitioner’s assertion, Washington courts have
6 been sensitive to developments in Eighth Amendment jurisprudence but have still held that an
7 adjudication of an adult offender’s article I, section 14 claim against an LWOP sentence imposed
8 pursuant to the POAA necessarily adjudicates the offender’s Eighth Amendment challenge as
9 well. Petitioner’s disagreement with the conclusions of the Washington courts is insufficient to
10 demonstrate that the state court in this case did not adjudicate the merits of his Eighth
11 Amendment claim when it denied his article I, section 14 claim.³

12 In sum, pursuant to substantial Washington state law precedent, the state court
13 necessarily analyzed Petitioner’s Eighth Amendment claim when it addressed his claim under the
14 more protective Washington constitutional provision. *See Moretti*, 446 P.3d at 613; *Witherspoon*,
15 329 P.3d at 894; *Rook*, 2013 WL 3227563, slip op. at 6–8. Therefore, while the state court did
16 separately analyze Petitioner’s Eighth Amendment claim, it nonetheless considered the relevant
17 evidence and the parties’ arguments regarding Petitioner’s federal and state constitutional claims
18 and duly rendered a decision. *See Johnson*, 568 U.S. at 302. Therefore, Petitioner has not
19 established that the state court did not adjudicate the merits of his Eighth Amendment claim.

20 ³ Petitioner also cites the Supreme Court’s analytical framework for determining whether
21 a silent state court opinion adjudicated the merits of a federal claim but acknowledges that the
22 state court in this case was not silent as to his Eighth Amendment claim. (*See* Dkt. No. 52 at 7–8)
23 (citing *Johnson*, 568 U.S. at 301–02). Petitioner further argues that the Washington State
24 Supreme Court has acknowledged that its jurisprudence regarding the interaction between article
25 I, section 14 and the Eighth Amendment has been inconsistent. (*See id.* at 8) (citing *Bassett*, 428
26 P.3d at 348). But this is not true as to cases involving an adult offender’s paired Eighth
Amendment and article I, section 14 challenges to an LWOP sentence imposed pursuant to the
POAA. As recently as August 2019, the Washington State Supreme Court unequivocally
reiterated that article I, section 14 is more protective in this context. *See Moretti*, 446 P.3d at 609
(citing *Witherspoon*, 329 P.3d at 894; *Bassett*, 428 P.3d at 350).

1 Petitioner's objections are OVERRULED on this ground.

2 **C. Contrary to or an Unreasonable Application of Supreme Court Precedent**

3 Petitioner contends that even if the state court adjudicated his Eighth Amendment claim
4 on the merits, its adjudication was contrary to or an unreasonable application of the Supreme
5 Court's Eighth Amendment jurisprudence. (Dkt. No. 52 at 9–11.) Petitioner first asserts that the
6 state court did not “acknowledge the unique severity” of an LWOP sentence and erroneously
7 compared his LWOP sentence with “sentences in other states that permitted discretionary life-
8 with-parole sentences,” contrary to the Supreme Court's decisions in *Solem v. Helm*, 463 U.S.
9 277 (1983), *Harmelin v. Michigan*, 501 U.S. 957 (1991), and *Graham*, 560 U.S. at 48. (See Dkt.
10 No. 52 at 10–11.)

11 A federal court may grant a state prisoner's habeas petition on a claim that was
12 adjudicated on the merits if the adjudication “resulted in a decision that was contrary to, or
13 involved an unreasonable application of, clearly established Federal law, as determined by the
14 Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). The “clearly established” phrase
15 “refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time
16 of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Under the
17 “contrary to” clause, a federal court may grant the prisoner's habeas petition only if the state
18 court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law,
19 or if the state court decided a case differently than the Supreme Court has on a set of materially
20 indistinguishable facts. *See id.* at 405–06 (2000).

21 In *Solem*, the petitioner was convicted of passing a “no account” check for \$100 and,
22 having been previously convicted of six nonviolent felonies, received an LWOP under South
23 Dakota's habitual offender statute. 463 U.S. at 279–82. In analyzing the petitioner's Eighth
24 Amendment challenge to his sentence, the Supreme Court looked to the gravity of his offense
25 and the harshness of his sentence, the sentences imposed on other criminals in the same
26 jurisdiction, and the sentences imposed for the same crime in other jurisdictions. *See id.* at 290–

1 301. In evaluating these factors, the Supreme Court emphasized the nonviolent nature of the
2 petitioner's offenses and the severity of an LWOP sentence as compared to a sentence of life
3 with the possibility of parole. *Id.* at 296–99. And while the Supreme Court acknowledged that
4 the petitioner could have received the same sentence for the same conduct in Nevada, it was
5 unaware of any similarly-situated offender receiving an LWOP sentence and thus found that “[i]t
6 appear[ed] that [the petitioner] was treated more severely than he would have been in any other
7 State.” *Id.* at 300–01. The Supreme Court accordingly concluded that the petitioner's sentence
8 was “significantly disproportionate to his crime” and therefore violated the Eighth Amendment.
9 *Id.* at 303.

10 In *Harmelin*, the Supreme Court clarified that the Eighth Amendment “forbids only
11 extreme sentences that are ‘grossly disproportionate’ to the crime.” 501 U.S. at 1001 (Kennedy,
12 J., concurring) (collecting cases); *see Graham*, 560 U.S. at 60. In upholding the petitioner's
13 mandatory LWOP sentence, imposed pursuant to Michigan law for possessing more than 650
14 grams of cocaine, the Supreme Court primarily looked to the serious nature of his underlying
15 criminal conduct. *See Harmelin*, 501 U.S. at 961, 1002–04 (discussing *Solem*, 463 at 296–99;
16 *Rummel v. Estelle*, 445 U.S. 263, 296 (1980)). The Supreme Court rejected the petitioner's
17 argument that a comparative analysis was required under *Solem*, stating that a such an analysis
18 was properly used “to validate an initial judgment that a sentence is grossly disproportionate to
19 the crime” and that because the petitioner's LWOP sentence did not “give rise to an inference of
20 gross disproportionality,” no comparative analysis was necessary in his case. *Id.* at 1005 (citing
21 *Solem*, 463 U.S. at 290–92, 298–300, & nn.16, 17; *Rummel*, 445 U.S. at 281; *Weems v. United*
22 *States*, 217 U.S. 349, 377–81 (1910)). The Supreme Court also rejected the petitioner's argument
23 that the mandatory nature of his LWOP sentence merited additional scrutiny under the Eighth
24 Amendment, stating that the legislature was not required to grant courts discretion in sentencing
25 and distinguishing the *Solem* sentencing judge's exercise of discretion to impose an LWOP
26 sentence. *Id.* at 1006 (citing *Chapman v. United States*, 500 U.S. 453, 467 (1991); *Solem*, 463

1 U.S. at 299 n.6)).

2 In this case, the state court addressed the serious nature of Petitioner’s LWOP sentence
3 when analyzing whether his sentence was disproportionate to his underlying criminal conduct in
4 violation of article I, section 14. *See Rook*, 2013 WL 3227563, slip op. at 6 (recognizing
5 Petitioner’s argument that his offense “did not warrant the imposition of the highest punishment
6 short of the death penalty”). The state court proceeded to thoroughly analyze the relevant
7 provisions of the POAA and the serious nature of Petitioner’s underlying criminal conduct,
8 concluding that he “faile[ed] to show that either the nature of the [offense] or the legislative
9 purpose warrants a less severe penalty and is therefore disproportionate in violation of the
10 constitutional prohibition against cruel punishment.” *Id.* at 7 (emphasis added). The state court’s
11 approach mirrors that of the Supreme Court in *Harmelin*, where the Supreme Court
12 acknowledged the gravity of the petitioner’s LWOP sentence but primarily analyzed the serious
13 nature of his underlying criminal conduct and the Michigan legislature’s authority to construct its
14 sentencing scheme. *Compare id.* at 6–7, with *Harmelin*, 501 U.S. at 1001–08. Thus, Petitioner
15 has not demonstrated that the state court’s decision was contrary to a decision of the Supreme
16 Court on this issue. *See Williams*, 529 U.S. at 405–06.⁴

17 The state court also conducted a comparative analysis pursuant to Washington law,
18 identified multiple other states under whose laws Petitioner would have received a similar
19 sentence for his underlying criminal conduct, and concluded that he “therefore fail[ed] to show
20 that there are no other states in which he would be subjected to a similar penalty for this
21 conduct.” *Rook*, 2013 WL 3227563, slip op. at 8. As a threshold matter, Petitioner has not
22 demonstrated that the state court’s comparative analysis was required under Supreme Court

23 ⁴ To the extent that Petitioner argues that the state court failed to give due consideration
24 to the nature of Petitioner’s LWOP sentence following the Supreme Court’s decision in *Graham*,
25 that argument fails for the reasons stated above. *See supra* Section II.B.; *Miller*, 123 S. Ct. at
26 2458 (noting that *Graham* “concluded that the [Eighth] Amendment prohibits a sentence of life
without the possibility of parole for a *juvenile* convicted of a nonhomicide offense”) (emphasis
added).

1 precedent. Under *Harmelin*, a comparative analysis is “appropriate only in the rare case in which
2 a threshold comparison of the crime committed and the sentence imposed leads to an inference
3 of gross disproportionality” and thus should be used “to validate an initial judgment that a
4 sentence is grossly disproportionate to a crime.” 501 U.S. at 1005. In this case, the state court did
5 not find that Petitioner’s LWOP sentence raised an inference of disproportionality under either
6 the Eighth Amendment or the more protective article I, section 14, and thus no comparative
7 analysis was called for under Supreme Court precedent. *See id.*; *Rook*, 2013 WL 3227563, slip
8 op. at 7. And while Petitioner takes issue with the state court’s requirement that he show that
9 there are “no other states in which he would be subjected to a similar penalty” for his underlying
10 criminal conduct, (Dkt. No. 52 at 10–11) (citing *Rook*, 2013 WL 3227463, slip op. at 8; *Solem*,
11 463 U.S. at 297), he does not establish that this was contrary to Supreme Court precedent. In
12 *Solem*, the Supreme Court noted that “courts *may* find it useful to compare the sentences
13 imposed for commission of the same crime in other jurisdictions.” 463 U.S. at 291 (emphasis
14 added); *see Harmelin*, 501 U.S. at 1005. The Supreme Court found that while the petitioner
15 could have theoretically received the same sentence for the same conduct in Nevada, the lack of
16 a comparative case made “[i]t [appear] that [the petitioner] was treated more severely than he
17 would have been in any other State.” *Solem*, 463 U.S. at 299–300. Petitioner has not established
18 that the fact-specific inquiry undertaken by the Supreme Court in *Solem* is part of the holding of
19 that case or that the state court’s analysis of other states’ laws under which Petitioner could have
20 received a similar sentence for comparable or lesser conduct was contrary to any such holding.
21 *See Rook*, 2013 WL 3227463, slip op. at 8; (Dkt. No. 52 at 11). Thus, to the extent *Solem* applies
22 to Petitioner’s case, he has not demonstrated that the state court’s decision was contrary to the
23 Supreme Court’s decision in *Solem*. *See Williams*, 529 U.S. at 405–06.

24 Petitioner next contends that the state court unreasonably applied various Supreme Court
25 decisions. (See Dkt. No. 52 at 11) (citing *Solem*, 463 U.S. at 293, *Harmelin*, 501 U.S. at 1001;
26 *Graham*, 560 U.S. at 48; *Edmund v. Florida*, 458 U.S. 782, 801 (1983)). Under the

1 “unreasonable application” clause of 28 U.S.C. § 2254(d)(1), a federal court may grant a state
2 prisoner’s habeas petition if the state court identified the correct governing legal principle from
3 the Supreme Court’s decisions but unreasonably applied that principle to the facts of the
4 prisoner’s case. *Williams*, 529 U.S. at 407–09; *see, e.g., Harrington v. Richter*, 562 U.S. 86, 106–
5 10 (2011) (discussing whether California Supreme Court’s application of *Strickland v.*
6 *Washington*, 466 U.S. 668 (1984), was unreasonable under 28 U.S.C. § 2254(d)(1)); *White v.*
7 *Woodall*, 572 U.S. 415, 420–21 (2014) (discussing whether Kentucky’s Supreme Court and
8 Court of Appeals’ application of the Supreme Court’s decisions in *Carter v. Kentucky*, 450 U.S.
9 288 (1981), *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314
10 (1999), was unreasonable under 28 U.S.C. § 2254(d)(1)). Petitioner has not pointed to any part of
11 the state court’s decision that identified the correct governing legal principles from the Supreme
12 Court decisions he cites before unreasonably applying those principles. (*See* Dkt. No. 52 at 11.)
13 In fact, as Petitioner points out earlier in his objections, the state court did not cite any of the
14 federal cases relied on by Petitioner. (*See id.* at 3) (“The state court of appeals declined to
15 separately analyze the Eighth Amendment argument. It also failed to cite a single federal case.”).
16 Therefore, Petitioner has not established that the state court unreasonably applied the Supreme
17 Court precedent he cites to the facts of his case. *See Williams*, 529 U.S. at 407–09.

18 In sum, Petitioner has not established that the state court’s decision was contrary to or an
19 unreasonable application of the Supreme Court’s Eighth Amendment jurisprudence, and his
20 objections are OVERRULED on this ground.⁵

21 ⁵ Petitioner also argues that even if his Eighth Amendment claim was adjudicated on the
22 merits, the report and recommendation erred when it found that his 50-state survey of habitual
23 offender statutes and accompanying declarations were barred under *Cullen v. Pinholster*, 563
24 U.S. 170 (2011). (Dkt. No. 52 at 11–13; *see* Dkt. Nos. 41-1–41-3.) Petitioner filed those
25 documents primarily in support of his argument that on *de novo* review the Court should find that
26 his LWOP sentence was grossly disproportionate to his underlying criminal conduct in violation
of the Eighth Amendment. (*See* Dkt. No. 41 at 12 – 24) (citing Dkt. Nos. 41-1–41-3). As the
Court concludes that the state court adjudicated the merits of Petitioner’s Eighth Amendment
claim and that the state court’s decision was not contrary to or an unreasonable application of
Supreme Court precedent, Petitioner is not entitled to *de novo* review of his Eighth Amendment

1 **D. Certificate of Appealability**

2 A petitioner seeking a certificate of appealability must demonstrate a “substantial
3 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(3). To satisfy this standard,
4 the petitioner must demonstrate either that reasonable jurists could disagree with the district
5 court’s treatment of the constitutional claims or “the issues presented were ‘adequate to deserve
6 encouragement to proceed further.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting
7 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Judge Tsuchida concluded that Petitioner is not
8 entitled to a certificate of appealability with respect to any of his claims. (Dkt. No. 47 at 59.) In
9 his objections, Petitioner argues that a certificate of appealability is warranted because he has
10 made a substantial showing of the denial of his constitutional rights, that jurists of reason could
11 disagree with the rejection of his Eighth Amendment claim, and that “jurists could conclude the
12 issues presented’—particularly the issue of first impression regarding the application of §
13 2254(d) to the court of appeals opinion under review—‘are adequate to deserve encouragement
14 to proceed further.’” (Dkt. No. 52 at 14) (citing 28 U.S.C. § 2253(c)(3)) (quoting *Miller-El*, 537
15 U.S. at 327). Based on its review of the report and recommendation and analysis of Petitioner’s
16 objections thereto, the Court disagrees with Petitioner’s contentions and DENIES Petitioner’s
17 request for the issuance of a certificate of appealability.

18 **E. Order Denying Permission to File Supplemental *Pro Se* Reply Brief**

19 On October 16, 2019, Judge Tsuchida denied Petitioner’s motion to consider his *pro se*
20 pleadings, finding that “Petitioner does not have a right to co-litigate a federal habeas petition
21 *pro se* while represented by counsel.” (Dkt. No. 46 at 2) (citing W.D. Wash. Local Civ. R.
22 83.2(b)(5)). Judge Tsuchida noted that “[a]s the Court may apply the Federal Rules of Civil

23 _____
24 claim. *See* 28 U.S.C. § 2254(d); *Richter*, 562 U.S. at 98. Therefore, the Court need not decide the
25 issue of whether Petitioner’s survey and declarations are barred under *Pinholster*. For the same
26 reason, the Court declines to grant Petitioner’s renewed request that he be granted habeas relief
premised on his Eighth Amendment claim. (*See* Dkt. No. 52 at 13) (citing Dkt. Nos. 41 at 12–23,
41-1–41-3).

1 Procedure to federal habeas petitions under Habeas Rule 12, the Court concludes petitioner has
2 no right to proceed pro se while represented.” (*Id.*) Judge Tsuchida further stated that Petitioner’s
3 professed “difficulty trusting counsel” was insufficient to merit allowing him to co-litigate his
4 case. (*Id.*) Nonetheless, Judge Tsuchida’s report and recommendation thoroughly addressed each
5 of Petitioner’s many asserted grounds for habeas relief. (*Id.* at 2–3; *see generally* Dkt. No. 47.)

6 Petitioner asks the Court to reverse Judge Tsuchida’s denial of his request to file a
7 supplemental *pro se* brief, arguing that application of the Federal Rules of Civil Procedure to
8 habeas proceedings is discretionary and that Petitioner’s distrust of counsel constitutes good
9 cause meriting suspension of the Rules in this case. (Dkt. No. 52 at 13–14.) As a threshold
10 matter, the Court is skeptical that Petitioner’s claim is properly brought in the context of
11 objections to a report and recommendation that does not address the issue. *See Thomas*, 474 U.S.
12 at 147. Further, Petitioner’s claim essentially asks the Court to reconsider Judge Tsuchida’s prior
13 ruling, and he has not identified a manifest error in Judge Tsuchida’s ruling or provided new
14 facts or legal authority which could not have been brought to the Court’s attention earlier with
15 reasonable diligence. *See W.D. Wash. Local Civ. R. 7(h)(1); Premier Harvest LLC v. AXIS*
16 *Surplus Ins. Co.*, Case No. C17-0784-JCC, Dkt. No. 61 at 1 (W.D. Wash. 2017); (Dkt. Nos. 52 at
17 13–14, 54 at 2–3). Therefore, Petitioner’s request is DENIED.

18 **III. CONCLUSION**

19 For the foregoing reasons, and having reviewed the entirety of the report and
20 recommendation and finding no error, the Court hereby ORDERS that:

- 21 1. Petitioner’s objections to the report and recommendation (Dkt. No. 52) are
22 OVERRULED;
- 23 2. The report and recommendation (Dkt. No. 47) is ADOPTED and APPROVED;
- 24 3. Petitioner’s habeas petition (Dkt. No. 7) is DENIED and the petition is DISMISSED with
25 prejudice;
- 26 4. Petitioner is DENIED issuance of a certificate of appealability; and

1 5. The Clerk is DIRECTED to send copies of this order to the parties.

2 DATED this 21st day of January 2020.

3
4
5 A handwritten signature in black ink, reading "John C. Coughenour", is written over a horizontal line.

6 John C. Coughenour
7 UNITED STATES DISTRICT JUDGE
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